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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

It is not contended that the possible existence of borderline cases makes a regulation unconstitutional. The regulation, to be constitutional, must, however, set forth a standard by which a person may be able to determine where the border exists. The present regulation contains no such standard.

Respondent has misconceived the issue in this case. The issue is not whether the words "practicable" and "feasible" would by themselves create a lack of certainty

in the statute. Nor does petitioner contend the possible existence of borderline cases makes a law constitutionally indefinite.

The problem presented by the Regulation which is involved in the present case is that there is no test by which one is to judge the sense in which "practicable" and "feasible" are used in the Regulation. The lack of certainty inherent in the Regulation is pointed up by the fact that the Court below, the Respondent, and the Port of New York Authority as *amicus curiae*, construe the Regulation in three different ways:

(1) The Court of Appeals, in its opinion, indicated that the test under the Regulation is that a trucker should select a route which had the "*fewest* congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." (R. p. 24; italics supplied.) Under this test, the defendant could prevail at the trial if it could show that by going through the tunnel it was taking the route which involved *less* congested thoroughfares, viaducts, places where crowds are assembled, etc. This would be a quantitative test—which of the routes has *less* of the proscribed places.

(2) On the other hand, the Respondent takes the position that a Regulation such as this "will be held to punish only wilful and negligent failure to consider the factor of safety." (Brief, p. 10; see also Brief, p. 24 "whether the *safest* route is also commercially feasible.") Under this test it is not the quantity of the proscribed places but the quality that would be determinative, *i.e.*, a ferry might *per se* be less dangerous than a tunnel even though the selection of the ferry might involve the truck in going through more congested areas, where crowds were assembled, than would the tunnel.

(3) The Port of New York Authority, as *amicus curiae*, then takes an entirely different position. It

apparently contends that the use of the tunnel was *ipso facto* a violation of the Regulation.

> "* * * use of the Holland Tunnel particularly at the height of the morning rush hour could never be considered an alternative open to a driver of a truckload of highly inflammable liquids and no such driver can possibly be heard to say that he didn't know that the Interstate Commerce Commission regulation intended to exclude such a cargo from such a tunnel." (*Amicus curiae* brief, p. 20.)

With a natural affection for their own tunnel, they take the position that the Regulation means that such a trucker may never use a tunnel.

We have, therefore, in the opinion of the Court below, and in the briefs filed on this appeal, three different and distinct interpretations as to what was intended by the Regulation. This would in itself seem to be a fairly conclusive indication of the inherent lack of ascertainable standard in the Regulation.

Both the Respondent and the Port of New York Authority have gone outside the record to refer to a so-called "explosives ferry" operated across the Hudson River by the Delaware, Lackawanna & Western Railroad. Certainly, the ferry was a "practicable" route in the sense that it was available and commercially possible. But if the test intended to be applied by the Regulation is that of "safety" or the quantitative test of going through the least number of congested areas, then the trucker would have to take into consideration the fact that this ferry leaves from the same ferryslip in Hoboken at which passenger ferries are constantly loading and unloading vast throngs of humanity, that it leaves from the most congested thoroughfare of Hoboken and goes to a most congested area in New York.

In making a determination under such a test, the trucker would have the right to consider that there are no pedestrians in the Holland Tunnel; that the tunnel has fire-fighting equipment stationed every few hundred yards and is continually patrolled by special police on a catwalk.

The damage caused by the fire in the Holland Tunnel was probably inconsequential compared to the disaster which might have been caused to the Port of New York and the communities surrounding it if the fire which is alleged to have started in this truck, had broken out while the truck was entering upon an explosives ferry which was loaded with dynamite or other explosives, and the inflammables on the truck were thereby brought into immediate proximity to a concentration of dangerous explosives on the ferry.

If the Regulation had directed a trucker to take the "safest" practicable route, all of these factors could be submitted to a jury so that they could determine whether the judgment of the trucker in choosing the tunnel route rather than the ferry route was a proper one or whether it was not a proper one. Individuals or juries might differ as to the conclusion to be reached from the facts, but they would have a standard set before them—"safety"—by which to judge the evidence and reach a conclusion.

But in the present Regulation, there is no such standard. The trucker is directed to pick a route which will avoid "(A)", "(B)", "(C)", and "(D)" "so far as practicable, and, where feasible." Of course, if he can avoid all of them, no problem arises. The problem arises where he can avoid some of them but not all of them. What is the standard to be used to determine whether to take a route which avoids "(A)" and does not avoid "(B)"?

Under the quantitative test of the Court of Appeals, the trucker would be justified in going through "(A)" if

his only alternative had been to go through "(B)" plus "(C)". Under the qualitative test urged by the Respondent, the trucker would not be justified in going through "(A)" unless it was safer than going through a combination of "(B)" plus "(C)". Under the absolute test urged by the Port of New York Authority, a trucker would never be justified in going through "(A)" if "(A)" was a tunnel.

Thus, the words "practicable" and "feasible" in the context of the present Regulation are indefinite and there is no standard by which performance is to be judged. This does not mean that a Regulation is indefinite merely because it may be difficult to make a judgment; it means that somewhere in the Regulation the nature of the judgment to be reached should be set out so that men of ordinary intelligence can know, before the event, what they were supposed to decide. Under the present Regulation, no matter where in any urban community the fire occurred, the trucker could be faced with the charge that he had violated the Regulation because there was another commercially "practicable" and "feasible" route to the place where he was going—as there always would be.

In the cases previously before this Court and relied upon by the Respondent, and by counsel for the Port of New York Authority, the problem was quite different. In those cases, there would be one determination to be made by a party, subject only to a subsidiary determination as to the practicability of that determination. Thus, in *Sproles* v. *Binford*, 286 U. S. 374, the question was as to the constitutionality of certain Texas penal provisions prohibiting the operation on any highway of any vehicle exceeding stated limitations of size and weight except

> "when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier

unloading point by way of the shortest practicable route to destination; * * *"

This fixed a standard for the trucker to follow—he was to go only by the shortest route, provided that route was "practicable." The shortest route was susceptible of definite determination. The practicability of a route was a matter for ordinary business judgment.

In the present case, the issue is not as to the "practicability" of alternative routes from a mechanical or commercial standpoint. Certainly, there are always alternative practicable routes from that standpoint. Undoubtedly, the trucker in the present case could have used a bridge with its accompanying viaducts or a ferry with its accompanying places where crowds are assembled. If he had used them and a fire had developed and people had been injured and property destroyed, to what standard could he appeal to show that the route he took was one which did not carry with it the criminal penalties of the Regulation? He had chosen a route which entered one of the proscribed places; and there were other alternative routes which, it is true, might also enter proscribed places. The inherent vice in the present Regulation is that no matter what route the trucker took, it could be charged after the event by a Grand Jury, as it was in the present case, that there was a "more practicable" route (R. p. 2) with no test as to what in these circumstances is to determine what is meant by more or less "practicable."

Respondent, in its brief (p. 34), states:

> "If all available routes are congested there would be no problem of choice. Necessity of a judgment as to practicability comes only when one is congested and another is not."

The brief then goes on to state:

> "As between the Lincoln Tunnel and the Holland Tunnel no choice is required. But both are to be avoided if practicable which might be the case if there is an available ferry."

This, as can be seen, begs the question inasmuch as the ferry itself and the entrance to the ferry and the exit from the ferry are just as congested as the tunnel.

Certainly, if this Regulation is construed to mean that a defendant could not be convicted if all available routes are over "congested thoroughfares", then no problem would arise under the Regulation. This, however, is not the standard fixed in the opinion of the Court below or, apparently, in the indictment in this case. The opinion of the Court below indicates that if there is a choice of going through various proscribed areas, then a quantitative determination must be made by the trucker as to which has the "fewest" of the proscribed places (R. p. 24). The indictment does not allege that it was possible for the trucker to go by a route which avoided all of the proscribed places. It merely alleges that there was a "more practicable" route (R. p. 2).

We have, therefore, a situation where a determination as to practicability of alternative routes going through proscribed places must be made by the trucker with no standard set by which he is to determine the sense in which "practicability" is used. Under the construction given to the Regulation by the Court of Appeals, the Regulation does not contain a sufficiently ascertainable standard of guilt.

II

It is neither difficult nor impossible to draft a regulation which imposes standards of reasonable certainty.

The argument is made by the Respondent that if the present Regulation is unconstitutional, no possible regulation could be drawn by the Interstate Commerce Commission which would carry out the instructions of Congress to "formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles." This is not correct.

The present Regulations, as Respondent shows in its brief, have frequently been amended and, presumably, they could be amended in the future.

It is not for petitioner to formulate regulations for the Interstate Commerce Commission but it perhaps should be pointed out that the state legislatures have met a similar problem very easily by fixing a standard by which the conduct of the trucker is to be judged. New York and New Jersey have both, within the present year, passed statutes (referred to in Respondent's brief, p. 41) relating to vehicular crossings of the Hudson River. These statutes provide:

> "'No person shall transport in or upon a vehicular crossing, any * * * inflammable or combustible liquids, * * * at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property."

These statutes fix a standard, well known in the law, of "reasonable care." The Regulation of the Interstate

Commerce Commission has no such standard. No matter what route is taken, and no matter what care is shown in choosing between various proscribed places on different routes, a trucker could be convicted if a jury should hold (as the Grand Jury has charged in the present case) that there was another "*more* practicable" route, with no standard fixed to determine what, in the light of the Regulation, is to be considered a more or less "practicable" route.

III

The Regulation is not given certainty by the fact that only one who "knowingly" violates it can be punished.

The Respondent contends that the word "knowingly" adds certainty to a Regulation which might otherwise be deemed uncertain. The Respondent states:

> "We contend that the words 'knowingly violates' will permit punishment only for a wilful or reckless failure to consider the factor of safety in the selection of a route for the motor transport of explosives and inflammables." (B. p. 42).

There is no such provision in the Regulation. It does not state that the "factor of safety" is to be the test used to determine the practicability of a route. If it did, the trucker could establish that in good faith it determined that the tunnel had more factors of safety than a ferry crowded with high explosives.

We must, therefore, consider what the word "knowingly" means. The Respondent admits that "knowingly" is a word of "differing meanings", depending upon the context in which it is used.

> "'Knowingly' is a word of differing meanings depending on the context in which it is used. We do not suggest that 'knowingly violates' as used in 18 U.S.C. 835 should always be construed to require more than a mere intent to do an act prohibited by the regulations." (B. p. 42)

In the present situation, the trucker is charged with knowledge of the Regulations. The trucker knew that his truck was going through the tunnel. He knew that there were other routes. He also knew, however, that any alternative route which he took would involve either "viaducts", "congested thoroughfares", "places where crowds are assembled", or "dangerous crossings." He therefore knew the facts. But there was no standard by which he was to determine which of the alternative routes he could legally take.

"Knowingly", as used in the statute, means no more than a knowledge of the Regulations and the facts. The Respondent is wrong in urging

> "* * * 'knowingly' implicitly means a specific criminal intent or at least such a reckless disregard of consequences as will enable prosecutors and courts to distinguish honest mistakes in judgment from criminal conduct." (B. p. 42.)

Respondent is attaching the same significance to the word "knowingly" as would be attached to the word "wilfully." The word "wilfully" means more than "knowingly". It means that there must be an evil design or bad purpose also present. *Felton* v. *United States*, 96 U. S. 699, 702; *Potter* v. *United States*, 155 U. S. 438, 446; *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69, 71 (C.C.A. 8th, 1909).

As was pointed out in the majority opinion of this Court in *Screws* v. *United States*, 325 U. S. 91, at 101, the use of the word "'wilful" means that

> "* * * something more is required than the doing of the act proscribed by the statute * * *. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime * * *. And that issue must be submitted to the jury under appropriate instructions."

It is for this reason that this Court in that case felt

> "* * * that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." (p. 101)

But where criminal penalties flow from a "knowing" violation of a Regulation, the question of "evil intent" does not arise. Knowledge of the Regulation and of the act done—if it is a prohibited act—is sufficient to result in a conviction. This makes it, therefore, all the more necessary that there be certainty in this Regulation so that a trucker charged with the duty of complying with the Regulation may know what standard he is supposed to employ in making a determination as to whether the choice made by him is prohibited or is not prohibited.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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